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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD., PETITIONERS

v.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT

ON ~~PETITION FOR A~~ WRIT OF CERTIORARI, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The District Court did not write an opinion. Its decree appears at R. 71–72. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 84–92) is reported in 104 F. (2d) 522.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered on May 11, 1939 (R. 92). A petition for rehearing was denied on June 6, 1939 (R. 109). The petition for a writ of certi-

orari was filed on August 4, 1939, and was granted October 9, 1939. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in a proceeding under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act to enjoin the enforcement of a compensation order, the finding of the Deputy Commissioner that the deceased was not a member of a crew (and so within the scope of the Act) is conclusive if supported by substantial evidence.

2. Whether in the present case the finding of the Deputy Commissioner that the deceased was not a member of a crew was supported by substantial evidence.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424; 33 U. S. C. and U. S. C. Supp. IV, Sec. 901 ff., are set forth in the Appendix, *infra*, pp. 38–47.

STATEMENT

John Schumann was drowned on October 31, 1937, while engaged in his duties as an employee of petitioner South Chicago Coal & Dock Company, on a vessel, "Koal Kraft." At the time of the accident, the vessel was in the navigable waters of the United States (R. 6, 14, 15, 40).

The boat was a lighter, used for fueling steamships and other marine equipment in the Calumet River and Harbor and in the Indiana River and Harbor (R. 13).

The boat was manned by a captain, an engineer, a fireman, and three "deck hands" (R. 15), as required by its certificate of inspection (R. 41–42). Whenever one of the men failed to show up he would be replaced by someone picked up at random (R. 42). The activity of the boat was seasonal, lasting about eight months a year (R. 36). The men who worked on the vessel began as laborers and acquired experience as they went along (R. 19). All of them were hired by the master (R. 16).

Schumann, who had had no previous experience with boats (R. 27), began work on the "Koal Kraft" on October 5, 1937 (R. 18), and continued in this employment until his death twenty-six days later (R. 18). It was an "on and off" job (R. 26). He signed no papers or "articles" (R. 18). His working hours, whenever he worked, ranged from eight to twelve hours a day (R. 17), averaging somewhat over ten hours each day (R. 23). He was paid at the rate of sixty cents an hour (R. 23).

His duties are variously described in the record. He handled lines on mooring the boat at the dock and on leaving the dock (R. 16). When the lighter arrived at the ship to be coaled, he threw a heaving line to the deck of that ship (R. 22). While the lighter was discharging the coal, he kept the coal running by prodding it down the chute with a long pole (R. 20, 35, 40). This was his main duty (R. 38–40). He did general deck work (R. 16), such as helping to scrub the deck (R. 35), and as an accommodation to the fireman helped with his work (R. 38). Although a deck-hand's work on a boat involves "general labor, keeping it clean, handling the lines, painting or whatever you ask him to do" (R. 18, 40),

Schumann had done no painting, since that work was done in the summer and he did not begin work until October (R. 40).

Schumann had no duties while the boat was under way from the time it left the dock to the time when it reached its destination (R. 22). He did not aid in the navigation of the boat (R. 20, 38). His only act of "seamanship" was throwing a heaving line (R. 21).

No sleeping quarters were provided on the "Koal Kraft" (R. 17), and Schumann never slept on the boat (R. 39). He stayed at home and waited for telephone calls directing him to report to work whenever he was needed (R. 20, 25–26, 39).

Schumann was drowned on October 31, 1937. He was last seen alive a short while after the boat had begun moving (R. 37), but the exact circumstances of his death are not explained in the record and are apparently unknown (R. 9). Schumann's wife and daughter filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 6–7, 43). Upon the facts stated above, the Deputy Commissioner found that on the date of his death Schumann was an employee of the South Chicago Coal & Dock Company and that on that date, while performing services for his employer as a laborer on the barge "Koal Kraft," he fell from the barge into the river and was drowned (R. 43–44).[1] An award was made (R. 44).

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[1] The Deputy Commissioner stated in his finding of fact that when Schumann fell from the barge it was "moored" (R. 43). This is apparently an error, but since there is no dispute that the barge was on navigable waters, it is a harmless error.

Thereupon, the petitioners filed a bill for injunction in the United States District Court for the Northern District of Illinois, Eastern Division, praying that the compensation order be set aside, upon the ground that Schumann was a "member of a crew" within the meaning of Sections 2 and 3 of the Act, and that the claim was therefore not within the provisions of the Act (R. 2–5).

The District Court granted a trial *de novo* on the question whether deceased was a member of a crew. Upon the hearing substantially the same evidence was introduced which had been introduced before the Deputy Commissioner (R. 47–68). The record of the hearings before the Deputy Commissioner (R. 8–42) was included in the record before the District Court (R. 60, 61).

The District Court found as a fact that at the time of his death Schumann was a member of a crew of a vessel and therefore not within the coverage of the Act (R. 71). Accordingly, it entered a decree permanently enjoining the enforcement of the compensation award (R. 71–72). On appeal, the Circuit Court of Appeals for the Seventh Circuit reversed. It held that the Deputy Commissioner's finding that Schumann was not a member of a crew was conclusive if supported by evidence and could not be reviewed *de novo* by the District Court (R. 87–89) and that the Deputy Commissioner's finding was supported by evidence (R. 89–91). It further held that, even if the question were one for the determination of the District Court *de novo*,

the judgment of the District Court should be reversed because the undisputed evidence established that Schumann was not a member of a crew (R. 91–92).

SUMMARY OF ARGUMENT

I

The question whether the deceased was a "member of a crew" was one for the determination of the Deputy Commissioner under the express language of the Act, and his findings of fact are conclusive if supported by substantial evidence in the record before him. The District Court was not empowered to try this issue *de novo* or to make an independent determination of the facts. The decision in *Crowell* v. *Benson*, 285 U. S. 22, has no application for the reason that "no constitutional question is presented" (*Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, 184).

II

The ultimate finding of the Deputy Commissioner that the deceased was not a member of a crew is supported by substantial evidence and the compensation order issued pursuant thereto was made in accordance with law. The facts in the case, though not disputed, give rise to conflicting inferences, and the standards for determining who is a member of a "crew," familiar as they are in the maritime law, are nonetheless too general to be applied to the circumstances of a particular case with any degree of certainty. This the decisions defining the term "member of a crew" abundantly illustrate.

The question presented is one which for want of a better term has sometimes been described as a "mixed question of fact and law." A consideration of common law doctrine, of the scope of review in the case of other administrative agencies, and of the purpose of the Longshoremen's Act, forcibly suggests that the determination of the Deputy Commissioner on this question should be given finality when supported by substantial evidence. The substitution of the judgment of the courts for that of the Deputy Commissioner on the question whether the claim is within the statute would invite futile and expensive litigation and thus defeat the purpose of the Act to achieve "prompt" and "inexpensive" disposition of compensation claims. No rule of law has been evolved sufficiently definite in its application to permit such "prompt" and "inexpensive" disposition by the courts. A review of the decisions arising under this and similar statutes is persuasive that no such rule can be evolved.

The Government, it should be noted, does not contend that the deputy commissioner is better qualified than the courts to pass on the question presented. No social or economic issue of great complexity is involved which would require special training for solution. It is our position, however, that the question is one as to which reasonable men may well disagree. In such circumstances nothing is to be gained by denying finality to the determination of the deputy commissioner, and the purpose of the Act may thereby be defeated.

ARGUMENT

I

THE FINDING OF THE DEPUTY COMMISSIONER THAT THE DECEASED WAS NOT A "MEMBER OF A CREW," IF REGARDED AS A FINDING OF FACT, WAS CONCLUSIVE IF SUPPORTED BY SUBSTANTIAL EVIDENCE.

The District Court granted petitioner a trial *de novo* on the question whether deceased was "a member of a crew" at the time of the injury, and found that he was, ignoring the contrary finding of the Deputy Commissioner. The court below held that the determination of the Deputy Commissioner upon the question was conclusive if supported by substantial evidence, and that it was so supported. Assuming what we will hereafter attempt to establish, that the finding of the Deputy Commissioner should be regarded as one of fact rather than as one of law, the holding of the court below that the finding was conclusive if supported by substantial evidence is in plain accord with the valid provisions of the Act.

Section 2 (3) of the Longshoremen's and Harbor Workers' Compensation Act provides that the term "employee" as used in the Act does not include a "master or member of a crew of any vessel * * *" and the question whether deceased was a member of a crew, if regarded as one of fact, was for the determination of the Deputy Commissioner. Section 3 (a) (1) provides that no compensation shall be payable in respect of the disability or death of "a master or member of a crew of any vessel, * * *." Section 19 of the Act, in providing for the filing of a "claim for compensation," expressly declares that "the deputy commissioner shall

have full power and authority to hear and determine all questions in respect of such claim." Section 21 (b) provides that a compensation order may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law, * * *." By this section the review of the courts is plainly limited to questions of law, including, of course, the question whether the Deputy Commissioner's findings of fact are supported by substantial evidence. Cf. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166, 169. The legislative history indicates that Congress intended to so limit review of the Deputy Commissioner's findings.[2] This Court has so construed similar statutory language providing for judicial review of decisions of the Board of Tax Appeals. *Phillips* v. *Commissioner*, 283 U. S. 589, 599–600; *Helvering* v. *Rankin*, 295 U. S. 123, 131; *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37; *Helvering* v. *National Grocery Co.*, 304 U. S. 282, 294.

Crowell v. *Benson*, 285 U. S. 22, does not require judicial review *de novo* of a determination whether a person is a member of a crew. In that case this Court held that the Act is not constitutional save where (a) the injury occurs upon navigable waters of the United States, and (b) the relationship of employer and employee exists at the time of the injury; that these limitations are "jurisdictional"; and that the statute must be construed to permit an independent judicial determination of the facts bearing on these two questions of constitutional jurisdiction in order to avoid grave doubts as to its constitutionality. So long, however, as

[2] See opinion of Mr. Justice Brandeis, dissenting, in *Crowell* v. *Benson*, 285 U. S. 22, at 72–73.

the injury occurs upon navigable waters and the relation of employer and employee exists Congress can in its discretion include or exclude "members of a crew" from the coverage of a particular statute. See *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 136. It can therefore leave to the determination of an administrative body the question whether any particular case is within the statutory exception.

In *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, this Court had before it a determination of the Interstate Commerce Commission that a carrier was not an interurban electric railway within the provision of the Railway Labor Act excluding such railways from the scope of that Act. The Court said (305 U. S. at 180):

> As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive. * * *

And later the Court said (305 U. S. at 184–185):

> As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interestate commerce and their employees, and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions[3] with respect to a trial *de novo* so far as the character of the respondent is concerned. * * *

[3] At this point the Court cited *Crowell* v. *Benson* and other cases in a footnote.

Accordingly the Court held that the determination by the Commission of the character of the railroad was conclusive, if not arbitrary and capricious, and if in accord with law, and that "That question must be determined upon the evidence produced before the Commission" (305 U. S. at 185).*

II

THE FINDING OF THE DEPUTY COMMISSIONER THAT THE DECEASED WAS NOT A MEMBER OF A CREW AT THE TIME OF THE INJURY SHOULD BE REGARDED AS ONE OF FACT AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is not enough, of course, to show that the determinations of the Deputy Commissioner on questions of fact are conclusive if supported by substantial evidence. As we have seen, Section 21 (b) of the Act, in providing that compensation orders may be set aside if not "in accordance with law," expressly reserves to the courts the determination of questions of law. This language of Section 21 (b) should be construed against the background of decisions in related fields, and with particular

* The record in the present case does not disclose that the respondent objected to the taking of additional evidence by the District Court. In his Brief filed with the Circuit Court of Appeals the respondent asserted that such an objection was made, although this assertion was contradicted in the brief of the petitioners. The court below considered that the question was before it and passed upon it, as indeed it should have done on its own motion. Cf. *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, 690; *Petroleum Co.* v. *Commission*, 304 U. S. 209, 216. Contrary to the assertion of the petitioner, the respondent assigned error to the District Court's substitution of its own findings for those of the deputy commissioner, including the finding that the deceased was not a member of the crew (R. 74).

reference to the controlling purpose of the Act as a whole. In this view the question of what general standard must be applied in determining who is a "member of a crew" would seem clearly to be a question to be decided by the courts, that is, a queston of law. It is the Government's position, however, that the application of the general standards laid down in the decisions to the circumstances of individual cases should be treated as a question of fact for the determination of the Deputy Commissioner.

A. THE MEANING OF THE TERM "MEMBER OF A CREW"

The Act as originally drafted extended to all employees engaged in "maritime employment," but the bill was amended to exempt "seamen" from its operation in response to the request of the seamen's representatives.[5] See *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 136. The phrase "master and members of the crew" was substituted for the word "seamen," no doubt for the reason that this Court has defined the word "seamen" for the purposes of the Jones Act to include the very longshoremen and stevedores intended to be covered by the Longshoremen's and Harbor Workers' Compensation Act. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; 68 Cong. Rec. 5402–5403.

The legislative history thus indicates plainly enough that the phrase "member of a crew" comprehends a

[5] Seamen retain their rights under the maritime law and the right of election under the Jones Act, c. 250, 41 Stat. 988, 1007, 46 U. S. C. Sec. 688, to bring an action under the Federal Employers' Liability Act.

narrower class than the word "seamen," but beyond this it sheds no light on the scope of the exception. Reference must, therefore, be made to judicial definitions of this term in the maritime law and especially under the Longshoremen's Act.

Judicial definitions of the term "member of a crew."—This Court has observed the wide "range of variation" in the use of the word "crew." *Warner* v. *Goltra*, 293 U. S. 155, 158. It is, for example, "sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers." *United States* v. *Winn*, 3 Sumn. 209, 213–214, Fed. Cases No. 16740 (Story, J.) (C. C. D. Mass.). Under the express language of the Longshoremen's Act all members of the ship's company are included, but many questions remain as to which the definitions laid down in the decisions provide only a general guide.

In the often-quoted opinion of Mr. Justice Story, in *United States* v. *Winn, supra*, at 219, the words "master, and crew" were held to include "all persons on board constituting the ship's company." This concept was enlarged upon in *The Bound Brook*, 146 Fed. 160, 164 (D. Mass.) where it was said that "when the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board", a definition approved in *The Buena Ventura*, 243 Fed. 797, 799 (Hough, J.) (S. D. N. Y.). These three deci-

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sions, and especially the language above quoted therefrom have been the principal reliance of the cases interpreting Section 3 of this Act. Some courts, however, have added the suggestion that Congress intended to exclude from the coverage of the Act only "seafaring men" subjected to the "perils of the sea." See *De Wald* v. *Baltimore & O. R. Co.*, 71 F. (2d) 810, 812, 813 (C. C. A. 4th), certiorari denied, 293 U. S. 581; *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. (2d) 245, 246 (C. C. A. 9th); *Diomede* v. *Lowe*, 87 F. (2d) 296, 298 (C. C. A. 2d).

The classes definitely included or excluded.—In certain groups of cases whether the Act applies is reasonably certain. Thus it is now clear that any "permanent" member of the ship's company living on board and accompanying the ship on its voyages is a "member of the crew" even though he is a doctor, a cook, an engineer, wireless operator, or even a bartender. *The Buena Ventura, supra; The J. S. Warden*, 175 Fed. 314 (S. D. N. Y.); *Lawrence* v. *Flatboat*, 84 Fed. 200 (S. D. Ala.) affirmed on opinion below, 86 Fed. 907 (C. C. A. 5th); *The Ole Oleson*, 20 Fed. 384 (C. C. E. D. Wisc.). In view of the express purpose of the Act, it is likewise clear that longshoremen and repairmen living on land and locally employed by stevedores and contractors to load, unload, or repair any vessel as their orders require, are not "members of a crew." See Hearing before the Subcommittee of the Senate Committee on the Judiciary on S. 3170, March 16 to April 2, 1936, 69th Cong., 1st Sess., pp. 19–21, 25–26.

The "twilight" zone.—There remains a class of workers, illustrated by the case at bar, who, "though

strictly speaking they are seamen, are employed upon harbor craft, on which they serve only during the day, leaving each night to go home, and renewing their work every morning, like any shore workmen. Such men are in the position of longshoremen or other casual workers on the water." *Scheffler* v. *Moran Towing & Transporation Co.*, 68 F. (2d) 11, 12 (L. Hand, J.) (C. C. A. 2d). Cf. *The John B. Lyon*, 33 Fed. 184, 186–187 (N. D. Ill.).

B. THE FINDING OF THE DEPUTY COMMISSIONER APPLYING THE LEGAL CRITERIA IN THE CASE AT BAR IS A REASONABLE, EVEN IF NOT THE ONLY RATIONAL, CONCLUSION

The general standards laid down in the decisions do not clearly reveal whether the deceased in the present case should or should not be classed as a member of a crew. For, though the facts are not disputed, the inferences to be drawn from them are conflicting. On the one hand the facts that the deceased served only during the day on an hourly basis, going home each night and returning to work every morning if called, that his duties were principally to load and unload coal, that he had no duties while the boat was in motion, that his only act of "seamanship" was throwing a heaving line, all point to the conclusion that he was not a "member of a crew" within the meaning of the Act. On the other hand, the fact that the deceased was employed by the master of the boat, that he was designated as one of three "deck-hands" required by the certificate of the Bureau of Navigation and Steamboat Inspection, that his services were performed while on the boat and included some comparable to those performed by ordinary seamen, point in the other direction. And while

the facts tend to give rise to conflicting inferences, no one of them is conclusive on the ultimate issue.

Petitioners stress the fact that the deceased was employed by the master of the vessel to whom he owed a duty of obedience. But the employment test is inconclusive. Shipowners not uncommonly employ their own longshoremen. In doubtful cases something may turn on whether the hiring is done by a land foreman or by the master. Cf. *Lawson* v. *Maryland Casualty Co.*, 94 F. (2d) 193, 194 (C. C. A. 5th); *Kraft* v. *A. H. Bull S. S. Co.*, 28 F. Supp. 437 (S. D. N. Y.); *Taylor* v. *McManigal*, 89 F. (2d) 583, 585 (C. C. A. 6th). But employment by the master is not necessarily conclusive that the employee was a member of the crew. The language of Section 3, excepting persons employed by the master "to load or unload or repair any small vessel under eighteen tons net" plainly evidences the intention of Congress to include some persons employed by the master for work on vessels of more than 18 tons. A master has authority to hire repairmen or stevedores in a wide variety of circumstances. See Robinson on *Admiralty*, 1939, 373–379; 390–394; 46 U. S. C. Secs. 971–973. In short, the coverage of the Act cannot be made to depend on the fortuitous circumstance whether the employee was hired by the master. Cf. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52; *Taylor* v. *McManigal*, 89 F. (2d) 583; *Southern Pacific Co.* v. *Locke*, 1 F. Supp. 992 (S. D. N. Y.); *Nr. AMC. 1444*.

The petitioner appears to suggest that the duty of "obedience" to a superior officer on board ship rather than the circumstance of employment may be the test. But this test is likewise inconclusive. Where one is

injured in preparing a vessel for a winter tie-up, for example, it should be immaterial that he was acting under orders of the chief engineer of the vessel. Cf. *Taylor* v. *McManigal, supra.* A workman engaged in the "triple capacity of seaman, stevedore, and fisherman" and injured when unloading cargo at a port of call should not be excluded from the coverage of the Act merely because ordered into the hold of the vessel by the master. But cf. *De Luca* v. *Red Salmon Canning Co.*, 2 Cal. App. (2d) 124, 126. And a workman hired as a longshoreman does not become a "member of a crew" while performing special duties assisting the crew of a lighter in shifting a vessel in the harbor. Cf. *Southern Pacific Co.* v. *Locke*, 1 F. Supp. 992 (S. D. N. Y.), 1932 A.M.C. 1404.

Petitioner emphasizes also that the vessel's certificate of inspection required a "crew" of six, including three "deck hands." But the meaning of the term "member of a crew" as used in this Act is not necessarily the same as in legislation regulating the licenses of vessels on the navigable waters of the United States. See *Warner* v. *Goltra*, 293 U. S. 155, 158. The exception applies, for example, to the *de facto* master of a vessel, even though the master's license for the vessel was issued in the name of another and only the person so named may be considered the master for the purpose of licensing and enrollment statutes. *Partridge* v. *Parker*, 1939 A. M. C. 508 (E. D. Va.).[6] The indication from

[6] Section 1607(c)(4) of the Internal Revenue Code, as amended by Section 614 of the "Social Security Act Amendments of 1939" (Pub. No. 379, 76th Cong., 1st sess.) exempts "an officer or member of the crew of a vessel on the navigable waters of the

the license, though some evidence that the deceased was "necessary" to the navigation of the vessel, does not furnish a workable test on the ultimate issue. Suppose, for example, that petitioners had employed seven men on the "Koal Kraft" when only six were required. What test could the Deputy Commissioner apply to determine which of the seven was "unnecessary" in the navigation of the vessel? It has been held that one hired and paid as a rigger by a company engaged in the construction and repair of vessels but employed mainly in the operation of a power launch assisting the vessels in the shipyards and drydock is covered by the Act even though he was one of the two persons required by the boat's license for its operation. *Moore Dry Dock Co.* v. *Pillsbury,* 100 F. (2d) 245 (C. C. A. 9th).

Probably Congress intended to include men ordinarily classified as longshoremen and stevedores and those indefinitely described as "harbor workers," but to exclude those ordinarily understood to be members of a "crew." The difficulty in this case is that the deceased's employment partook of the characteristics both of a harbor worker and of a member of a crew, and the task of the Commissioner was to determine the

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United States" from the application of the federal unemployment insurance tax. The intention of Congress apparently was to exempt migratory workers because of difficulty of administration and identification. The exception therefore has no application to longshoremen, and would probably be similarly construed in the case of casual workers on the water maintaining a home on land. But the fact that the deceased may have been subject to this tax should not necessarily be decisive of his right to the protection of the Longshoremen's Act. Cf. *Kraft* v. *A. H. Bull S. S. Co., supra;* but cf. *Antus* v. *Interocean S. S.,* 1939 A. M. C. 617 (N. D. Ohio, affirmed December 12, 1939 (C. C. A. 6th), not yet reported).

"dominant characteristics." Cf. *Shields* v. *Utah Idaho Central R. R. Co., supra,* at 187. In making this determination the Deputy Commissioner might reasonably conclude that the deceased's duties of seamanship, however necessary for the navigation of the ship from the point of view of the Inspection Service, were relatively unimportant in determining whether the deceased was a "seafaring man" intended to be excluded from the operations of the Longshoremen's and Harbor Workers' Compensation Act.

In reaching the conclusion that the finding of the Deputy Commissioner was sustained by substantial evidence, the court below emphasized the fact that the deceased's "main duty" was to load and unload coal to be used in fueling other vessels, and that this duty corresponded closely to the function of a longshoreman or stevedore. The petitioners insist, however, that it is not the character of the work, but the place where it is performed that is controlling. Reliance is placed on the cases, cited above, which hold that persons hired as part of the permanent staff of the ship and accompanying the ship on its voyage in the capacity of cooks, engineers, or firemen, are members of the "crew" even though persons performing such functions on land are ordinary landlubbers. But the test of the place where the work is performed is obviously inconclusive, otherwise it would operate to exclude from the coverage of the Act all longshoremen and stevedores injured while working on boats. If the suggested test is to be qualified by the limitation that the work must be performed in furtherance of navigation on the boat while the voyage is in progress, then the deceased was not a

member of a crew for admittedly he "had no duties except when the ship was moored" (R. 22).

The test suggested by the petitioners does not aid their case, even if it be accepted as sound in principle. Certainly, the place as distinguished from the character of the work is not controlling in the absence of some more or less permanent attachment to the boat. "Casual workers" without any continuous connection with any one boat can hardly be considered members of a "crew." Cf. *Kraft* v. *A. H. Bull S. S. Co., supra; The J. P. Schuh*, 223 Fed. 455, 458 (S. D. Ala.). The same would seem to be true of persons employed as longshoremen or repairmen but temporarily engaged in assisting in the navigation of a vessel. Cf. *Southern Pacific Co.* v. *Locke, supra; Wheeler Shipyard, Inc.* v. *Lowe*, 10 F. Supp. 32 (E. D. N. Y.); 13 F. Supp. 963.

The point at which the employee becomes "permanently" attached to the vessel (*Maryland Casualty Co.* v. *Lawson*, 94 F. (2d) 190, 192–193 (C. C. A. 5th)) must be decided according to the facts of each case. Here, the deceased was employed on an hourly basis and had worked, as called, for a period of twenty-six days on the "Koal Kraft," at the time of the accident. It is difficult to believe that the case would be different if the accident had occurred on the first day, or the seventh, or if there had been some breaks in the continuity of deceased's employment on the "Koal Kraft," during which periods he had worked at odd jobs on land. The inference that the deceased was not "permanently" attached to the vessel in this case is strengthened, of course, by the fact that no provision was made for sleeping quarters on the vessel and the deceased re-

turned to his home every morning. Cf. *Kibadeaux* v. *Standard Dredging Co.*, 81 F. (2d) 670, 673–674 (C. C. A. 5th).

Thus the facts as to the character of the deceased's duties, the place where they were performed and the extent of his attachment to the vessel are more or less inconclusive. In such circumstances, it may sometimes be helpful to consider the employee's past experience as some indication as to whether he was a "seafaring" man (cf. *Wheeler Shipyard, Inc.* v. *Lowe, supra*), but this inquiry in the present case is likewise inconclusive. The deceased had worked as a miller in a flour mill in Chicago prior to his employment on the vessel "Koal Kraft" (R. 25). While working on the vessel, however, he sometimes volunteered assistance to the fireman, possibly with expectation of graduating to that position (R. 16, 22). Plainly enough, in his former employment a month prior to the accident, he was not a seaman; but neither was he then a longshoreman or harbor worker.

C. WHETHER A PERSON IS A "MEMBER OF A CREW" SHOULD BE TREATED AS A QUESTION OF FACT FOR THE DETERMINATION OF THE DEPUTY COMMISSIONER

No rule of law has or can be evolved which will eliminate uncertainty as to whether a workman in this "twilight zone" is a "member of a crew." The suggestion that the deputy commissioner determine the question in light of the particular facts of each case finds support in the principles governing the division of function of court and jury and the scope of review of administrative agencies generally. The decisive consideration, however, is that the substitution of the

judgment of the courts for that of the deputy commissioner would defeat the purpose of the Longshoremen's Act.

1. *No rule of law has or can be evolved which will substantially eliminate uncertainty as to whether a person is a "member of a crew"*

The considerations discussed in the analysis of the evidence in the instant case may explain why the decisions "attempt no definition of the crew of a vessel." *Maryland Casualty Co.* v. *Lawson,* 94 F. (2d) 190 at 192 (C. C. A. 5th); *Diomede* v. *Lowe,* 87 F. (2d) 296, 298 (C. C. A. 2d). For each case involves "the complexity inherent in the multiple small facts which go to make up the ordinary situations of daily life." Dickinson, *Administrative Justice and the Supremacy of Law,* p. 251.

The decisions of the courts which have interpreted the term "a member of a crew" demonstrate that a definite rule of general application cannot be formulated.

An individual in sole charge of a scow having no means of self-propulsion has been held not to be within the exception of the Act, for the reason that a "crew" is by definition the "ship's complement," a collective noun connoting a group of individuals. *Diomede* v. *Lowe,* 87 F. (2d) 296 (C. C. A. 2d), certiorari denied, 301 U. S. 682; *De Wald* v. *Baltimore & O. R. Co.,* 71 F. (2d) 810 (C. C. A. 4th), certiorari denied, 293 U. S. 581. The same result has been reached where a series of scows, each in charge of one man, were in tow of a single tug, even though those in charge of the tug and scow are usually considered one crew in such cases.

Harper v. *Parker*, 9 F. Supp. 744 (D. Md.). Two men on a scow in tow of a tug, however, were held members of the "composite" crew. *Maryland Casualty Co.* v. *Lawson*, 94 F. (2d) 190 (C. C. A. 5th). Numbers are not always conclusive. Thus a skiff or rowboat manned by three employees was held not even a vessel within the meaning of the Act for the reason that it had no "permanent" crew or personnel. *Lawson* v. *Maryland Casualty Co.*, 94 F. (2d) 193 (C. C. A. 5th). But one who was hired for two days to assist in the navigation of a yacht used solely for the purpose of making a motion picture was held a "member" of the crew. *Don Lee, Inc.* v. *Pillsbury*, S. D. Calif. (1935) unreported; see abridged report, 1935 A. M. C. 341.

Status as a member of a crew is not necessarily permanent. Thus one who was injured in overhauling and disconnecting the engines while the vessel was tied up at a dock during the winter season was held not to be within the exception even though he had been a member of the crew during the preceding season and continued to live on board the vessel. *Antus* v. *Interocean S. S. Co.*, *supra*. It has been held immaterial in such a case that the injured workman was hired on a five months' basis with the understanding that he would accompany the vessel on its reentry into service. *Taylor* v. *McManigal*, 89 F. (2d) 583 (C. C. A. 6th). While such employees no doubt continued to be "seafaring men," they were not assisting in the navigation of the vessel at the time of the injury. Cf. *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. (2d) 779 (C. C. A. 2d); *T. J. Moss Tie Co.* v. *Tanner*, 44 F. (2d) 928 (C. C. A. 5th); *Union Oil Co.* v. *Pillsbury*, 63 F. (2d) 925 (C. C. A. 9th). But where the vessel was laid up for a period of five weeks

and the employee was called to load coal on the day before the vessel reentered service preparatory to the voyage, the employee was held to be a member of a crew. *Jones* v. *Shepherd*, 20 F. Supp. 345 (S. D. Miss.). Something may depend on the status of the superior officer. A person employed in the triple capacity of "seaman, stevedore, and fisherman" was held a member of a crew when injured while unloading a cargo at the port of call, for the reason that he was acting pursuant to the orders of the master. *DeLuca* v. *Red Salmon Canning Co.*, 2 Cal. App. (2d). 124. However, one engaged in repairing and conditioning the vessel was held not to be a member of a crew even though acting under the orders of a chief engineer on board the vessel. Cf. *Taylor* v. *McManigal*, *supra*.

Courts seem to be more reluctant to hold that a longshoreman has become a member of a crew than that a member of a crew has become a longshoreman. Thus, one who was hired as a longshoreman with the special duty of aiding in the navigation of a lighter was held not to be a member of a crew when injured in performing that special duty. *Southern Pacific Co.* v. *Locke*, 1 F. Supp. 992 (S. D. N. Y.). And a workman employed to paint motorboats who occasionally towed motorboats to purchasers was not a member of a crew when injured in delivering the boats. *Wheeler Shipyard, Inc.* v. *Lowe*, 19 F. Supp. 863 (E. D. N. Y.). Such men, of course, are not "seafaring men." But an employee hired as an alternate deck-hand may become a member of a crew if temporarily taking the place of the regular deck-hand. Cf. *Kraft* v. *A. H. Bull S. S. Co.*, 28 F. Supp. 437 (S. D. N. Y.).

2. The principles governing the division of function of court and jury furnish a persuasive analogy

The confusion in the decisions is due to the nature of the problem. The question presented is one of those which, for want of a better phrase, may be called a "mixed question of fact and law." Cf. *Pearce* v. *Lansdowne*, 62 L. J. R. (N. S.) (Q. B. Div. 1893) 441, 444. The application of the general standards prescribed by the Act and the decisions must necessarily vary according to the particular circumstances of each case. No definite rule of law has been established or could be established which would determine their application in every conceivable situation. And where the law is couched in such general terms, its application to particular circumstances should be left to the trier of the facts.

Such was the rule at common law. See Thayer, *Preliminary Treatise on Evidence*, 249–253 (1898); Bohlen, *Mixed Questions of Law and Fact*, 72 U. of Pa. L. Rev, 111, 115. The negligence cases are the most familiar examples, but the rule is the same where the applicable standard is more comparable to the one at bar. In *McLanahan* v. *Universal Ins. Co.*, 1 Pet. 170, an action was brought on a policy of insurance for the loss of a vessel. One defense was that the ship was unseaworthy because the master and sufficient crew were not on board at commencement of the homeward voyage. This Court reversed a directed verdict for the defendant. Mr. Justice Story, for the Court, observed (p. 184):

> What is a competent crew for the voyage? at what time such crew should be on board? what is proper pilot ground? what is the course and usage of trade in relation to the

> master and crew being on board, when the ship breaks ground for the voyage? are questions of fact, dependent upon nautical testimony; and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs.

The function of the jury is the same where the general standard to be applied is one embodied in a statute. The case of *Pearce* v. *Lansdowne, supra,* is illuminating. In that case the plaintiff, a potman at a public house, brought an action against his employer under an employers' liability act which expressly exempted from its operation a "domestic or menial servant." The jury gave a verdict in favor of the plaintiff subject to the question, reserved by the court, whether the plaintiff was within the exception of the act. Thereafter the County Court Judge heard evidence and concluded that the plaintiff was a "domestic or menial servant" and not within the coverage of the statute. On appeal to the Queen's Bench Division, the judgment was affirmed. The court held that the question was one of fact which should have been left to the jury but that on request of counsel the appellate court was empowered to dispose of the matter finally where the facts were not in dispute. On the issue of fact, the members of the court were agreed that the plaintiff was a domestic or menial servant and not within the coverage of the act. In the course of his opinion, as reported in 69 L. T. R. 316, Williams, J., observed:

> I believe that a great part of the difficulty in this case—and there is a great deal of difficulty in it—has arisen from the distinction between

> the functions of the judge and those of the jury not being sufficiently kept in mind. The scheme of the English law is not to lay down accurate verbal definitions which shall draw a hard-and-fast line to determine every case as it arises, but has always been to draw elastic definitions, not absolute hard and rigid definitions, and to leave it to the jury in each case to say whether the particular facts of the case bring it within or without the definition.

After observing that the principle is the same where the facts are agreed, he added (*Id.*, p. 317):

> * * * no one can doubt that, on the facts, it is possible that reasonable persons may take different views as to whether the plaintiff was "a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labor," or not, and it is also possible that on the admitted facts they would take different views as to whether or not he was a "domestic or menial servant." Under these circumstances I wish to say as emphatically as I can that it seems to me here that the County Court judge took upon himself the functions of the jury without any occasion for so doing.

Concluding that a rule of practice permitted the appellate court to make a final settlement of the matter where all the facts were before it, the judge defined the functions of the court under these circumstances as follows (*Id.*, p. 318):

> We are entitled now to instruct ourselves in the same way as if we were summing up to a jury, and then, applying the instructions to the admitted facts of the case, we shall be within

> the jurisdiction assumed by the Court of Appeal in giving such a judgment as shall finally settle the matter, though we must, which I hesitate to do, draw inferences of fact which ought to have been drawn by the jury.

Judge Collins was of the same opinion. (*Id.*, 318–319.)

3. *Substitution of the judgment of the courts for that of the deputy commissioner would defeat the purpose of the act*

This Court has frequently held that where the statutes enforced by an administrative agency are defined in general terms the ultimate findings of fact of the administrative body are likewise conclusive if supported by evidence and do "not violate any principle of law." *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166, 169. That case arose under the Longshoremen's Act and the question was whether the injury arose out of and in the course of the employment. The determination of the deputy commissioner upon this issue was held to be conclusive if supported by evidence. See also *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37, 40; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304; *Helvering* v. *National Grocery Co.*, 304 U. S. 282, 294; *Manufacturers' Railway Co.* v. *United States*, 246 U. S. 457, 481; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361; *I. C. C.* v. *Alabama Midland R. R.*, 168 U. S. 144, 170; Scharfman, *The Interstate Commerce Commission*, Vol. II, p. 441; Bohlen, 72 U. of Pa. L. Rev. 111, 115; Dickinson, *Administrative Justice and the Supremacy of Law*, pp. 50, 71, *cf.* 312, 314–315. The principle has been given application even where the primary or evi-

dential facts are not in dispute; the inferences to be drawn from the facts are for the determination of the administrative agency. *United States* v. *L. & N. R. R.*, 235 U. S. 314; *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 61; Cf. *Elmhurst Cemetery Co.* v. *Commissioner, supra*, at p. 40; *Helvering* v. *National Grocery Co., supra*, at 294.

The scope of judicial review, of course, must vary according to the nature and purpose of the Act in question. The principle suggested, however, is peculiarly applicable to judicial review of compensation orders entered pursuant to the statutory scheme of the Longshoremen's Act. The purpose of Congress, to provide a "prompt" and "inexpensive" (*Crowell* v. *Benson*, 285 U. S. at 46–47) method for the disposal of claims is clear from the face of the Act. Compensation becomes due fourteen days after the employer has knowledge of the injury (Sec. 14(b)). Where the right to compensation is controverted and an award is made by a deputy commissioner, a penalty of twenty percent is assessed for failure to make compensation within ten days after payment is due (Sec. 14(f)). *Candado Stevedoring Corp.* v. *Lowe*, 85 F. (2d) 119 (C. C. A. 2d); *Arrow Stevedore Co.* v. *Pillsbury*, 88 F. (2d) 446 (C. C. A. 9th). If the employer fails to make payment within thirty days after compensation is due, the deputy commissioner may enter a supplementary order directing payment, on which judgment and execution may be had in the appropriate federal district court (Sec. 18). In order that the burdens, delays, and hazards of litigation may not be used to induce employees to make

disadvantageous agreements, any waiver of the right to compensation is forbidden by Congress (Sec. 15(b)), agreements for compensation without the approval of the Commission are prohibited (Sec. 16),[7] and the district attorney is directed to appear on behalf of the deputy commissioner and defend compensation orders (45 Stat. 490). To minimize the law's delays, the Act prescribes certain limitations on the granting of interlocutory injunctions staying the payment of compensation (Sec. 21(b)).

This Court has recognized that in order to achieve the purposes of the Act the determinations of the deputy commissioner must be given finality if supported by substantial evidence, at least where no constitutional question of jurisdiction is presented. In *Crowell* v. *Benson*, 285 U. S. at 46–47, this Court said:

> To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circum-

[7] Section 8 (i) permits the Deputy Commissioner to approve settlements with the approval of the Commissioner in certain limited classes of cases. Subject to this exception Section 16 forbids compromise of claims even with the approval of the Deputy Commissioner or of the Commissioner.

stances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded.

For the courts to undertake to apply the general standard prescribed by the statute to the endless variety of circumstances which may arise in the administration of the Act is at once to invite and to create the cause of litigation, and thus to defeat the purpose of the Act. In the past as much as four years has sometimes elapsed between the date of application for judicial review under Section 21 (b) and final disposition in the courts:[5]

[5] This statement is based upon data in the files of the United States Employees' Compensation Commission relating to the following twenty-five typical cases: *Union Stevedoring Corp.* v. *Norton*, 98 F. (2d) 1012 (C. C. A. 3d) (2 yrs., 1 mo., 16 days); *Hartford Accident & Indemnity Co.* v. *Hoage*, 77 F. (2d) 381 (App. D. C.), certiorari denied, 296 U. S. 609 (2 yrs., 11 mos., 24 days); *Weyerhaeuser Timber Co.* v. *Marshall*, 102 F. (2d) 78 (C. C. A. 9th) (2 yrs., 13 days); *Texas Employers' Insurance Assn.* v. *Sheppeard*, 62 F. (2d) 122 (C. C. A. 5th) (10 mos. 20 days); *Bethlehem Shipbuilding Corp., Ltd.* v. *Cardillo*, 102 F. (2d) 299 (C. C. A. 1st), certiorari denied, 307 U. S. 645 (2 yrs., 2 mos., 30 days); *Maryland Casualty Co.* v. *Lawson*, 94 F. (2d) 190 (C. C. A. 5th) (1 yr., 4 mos., 20 days); *Continental Casualty Co.* v. *Lawson*, 64 F. (2d) 802 (C. C. A. 5th) (1 yr., 2 mos., 5 days); *New Amsterdam Cas. Co.* v. *McManigal*, 87 F. (2d) 332 (C. C. A. 2d) (1 yr., 5 mos., 9 days); *Norton* v. *Travelers Ins. Co.*, 105 F. (2d) 122 (C. C. A. 3d) (1 yr., 10 mos., 29 days); *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. (2d) 245 (C. C. A. 9th) (1 yr., 5 mos., 27 days); *Maryland Cas. Co.* v. *Lawson*, 101 F. (2d) 732 (C. C. A. 5th) (1 yr., 5 mos., 10 days); *Southern S. S. Co.* v. *Norton*, 101 F. (2d) 825 (C. C. A. 3d) (1 yr., 3 mos., 30 days); *Luckenbach S. S. Co.* v. *Norton*, opinion on final judgment not reported, interlocutory injunction denied, 21 F. Supp. 707 (E. D. Pa.) (1 yr., 8 mos., 22 days); *Chas. M. McCormick Lumber Co.* v. *Marshall* (not reported, W. D. Wash., July 6, 1937) (4 yrs., 5 mos., 8 days); *W. J. Jones & Sons, Inc.* v. *Marshall* (not reported,

If payment of compensation is stayed by injunction, the claimant may be denied the means of support in the interim, even though it may ultimately develop that the award was in accordance with law. The instant case sufficiently illustrates the danger of delay. The accident occurred on October 31, 1937, and an award was made on February 21, 1938 (R. 44). The application for review under Sec. 21 (b) was filed by the employer on March 3, 1938 (R. 2), and a temporary injunction staying payment was granted on March 8, 1938, which was made permanent on July 8, 1938 (R. 71–72). The decision of the court below reversing the order of injunction was not rendered until May 11, 1939 (R. 84), and an order was thereafter entered staying the mandate until further order, on condition that the petitioners promptly file their petition for writ of certiorari in this court (R. 112). Such delays may make some compromise essential in order that the claimant may receive any effective compensation.* The court of last resort

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D., Ore.) (4 yrs., 9 mos., 7 days); *Metropolitan Cas. Ins. Co.* v. *Hoage*, 72 F. (2d) 175 (App. D. C.) (1 yr., 10 mos., 26 days); *American Employers' Ins. Co.* v. *Cardillo* (not reported, App. D. C.) (1 yr., 6 mos., 4 days); *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162 (2 yrs., 2 days); *United States Fidelity & Guaranty Co.* v. *Lawson*, 15 F. Supp. 116 (S. D. Ga.) (11 mos., 26 days); *Baltimore & O. R. Co.* v. *Clark*, 59 F. (2d) 595 (C. C. A. 4th) (5 mos., 5 days); *Georgia Casualty Co.* v. *Hoage*, 59 F. (2d) 870 (App. D. C.) (1 yr., 1 mo., 30 days); *United States Fidelity & Guaranty Co.* v. *Hoage* (not reported, App. D. C.) (2 yrs., 6 mos., 26 days); *Hartford Accident & Indemnity Co.* v. *Hoage*, 85 F. (2d) 420 (App. D. C.) (9 mos., 11 days); *New Amsterdam Cas. Co.* v. *Hoage* (not reported, App. D. C.) (2 yrs., 7 mos., 7 days); *International Mercantile Marine Co.* v. *Lowe*, 93 F. (2d) 663 (C. C. A. 2d), certiorari denied, 304 U. S. 565 (3 yrs., 4 mos., 22 days).

* In the unreported case of *Charles M. McCormack Lumber Co.* v. *Marshall* (W. D. Wash., July 6, 1937), the employer made ap-

may, of course, ultimately conclude that the award should be set aside but such a decision may merely demonstrate that reasonable men can differ as to the application of Section 3 in the circumstances of a particular case. And to deny compensation in such cases is to fail to give effect to the presumption created by the express terms of Section 20, *infra*, p. 44.

The lower federal courts have not succeeded in evolving a rule of law sufficiently definite and certain in application to insure the "prompt" and "inexpensive" disposition of compensation claims by the courts. No such rule, we submit, can be evolved.

The record of decisions undertaking to define the permissible scope of the Federal Employers' Liability Act is instructive. This Court early ruled that the Act extended to cases where the employee was engaged in work closely connected with interstate commerce: under that test an employee injured while carrying rivets for repair of a bridge used for both interstate and intrastate commerce was held to be within the protection of the Act. *Pedersen* v. *Delaware Lack. & West. R. R.*, 229 U. S. 146. The Court soon undertook to determine the application of this test to a yard clerk who was struck while crossing the yard to meet an interstate train to

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plication for review under Sec. 21 (b) on October 31, 1932, and an interlocutory injunction was granted on January 28, 1933. On July 6, 1937, more than four years later, the district attorney consented to the entry of an order setting aside the compensation award. The consideration to the claimant for this agreement, if any, is not shown by the court's order. In *Lykes Bros.-Ripley Steamship Co., Inc.* v. *Sheppeard* (unreported), decided November 13, 1935, the decree of the District Court (E. D. Tex.) expressly recites the consideration.

check the car numbers and seals, *St. Louis & San Francisco Ry.* v. *Seale*, 229 U. S. 156; to a locomotive fireman who was struck while crossing the tracks to his boarding house after oiling and inspecting an engine preparatory to an interstate run, *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248; to one who was killed while moving intrastate freight across the city preparatory to interstate commerce, *Illinois Central R. R.* v. *Behrens*, 233 U. S. 473; to a switchman riding on a car used in interstate commerce, *Toledo, St. L. & West. R. R. Co.* v. *Slavin*, 236 U. S. 454; to a brakeman who was on an intrastate car for the purpose of cutting it out in order that an interstate train might proceed, *New York Central R. R.* v. *Carr*, 238 U. S. 260; to the mining of coal in the railroad's mine for the railroad's use in interstate commerce, *Delaware, Lack. & West. R. R.* v. *Yurkonis*, 238 U. S. 439; to the distribution of cars of an interstate train to make room for another interstate train, *Seaboard Air Line* v. *Koennecke*, 239 U. S. 352; to the making of a trial run to test an engine for use in interstate commerce, *Southern Railway* v. *Lloyd*, 239 U. S. 496; and to the switching of "empties" preparatory to switching coal cars coming from outside the state, *Pennsylvania Co.* v. *Donat*, 239 U. S. 50. Three years after the decision of the *Pedersen* case, the rule was modified in *Shanks* v. *Delaware Lack. & West. R. R.*, 239 U. S. 556, the word "transportation" being substituted for the word "commerce."

The decisions reflect the difficulty of making consistent application of any test in a variety of factual circumstances. Thus, for a time at least, one who oper-

ated a signal tower and pumping station for the supply of water for interstate and intrastate trains was held to be within the protection of the Act (*Erie R. R. Co.* v. *Collins*, 253 U. S. 77, overruled, *Chicago & E. I. R. Co.* v. *Commission*, 284 U. S. 296), but a switchman taking coal cars into a chute for use on interstate trains was found to be engaged in intrastate commerce, *Chicago, Burlington & Q. R. R.* v. *Harrington*, 241 U. S. 177. One who was employed on a train which never left the state, but carried coal cars, some of which went outside the state, to a point where it was taken over by another crew for transportation to scales for weighing, was held to be engaged in interstate commerce (*Philadelphia & Read. Ry. Co.* v. *Hancock*, 253 U. S. 284), but an employee of a logging company engaged as a brakeman on trains transporting logs over the company's railroad to tidewater where the logs were sold and then moved outside the state, was not within the protection of the Federal Government, *McCluskey* v. *Marysville & Northern Ry. Co.*, 243 U. S. 36. An employee unloading goods from outside the state was held to be engaged in interstate commerce, *Baltimore & O. S. W. R. R.* v. *Burtch*, 263 U. S. 540, but not if the unloading occurred seventeen days after the arrival of the goods, *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183.[10] Whether or not as a consequence of such decisions, litigation on this question increased rather than decreased in the course of time.[11] It is not clear that the decisions of this Court reached the only permissible result in the particular cases. Cer-

[10] The decisions on the Federal Employers' Liability Act are fully discussed in Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 Harv. L. Rev. 389.

[11] See Schoene and Watson, *supra*, p. 407.

tainly they did not facilitate the "prompt" and "inexpensive" disposition of the employee's claims, whatever may have been the need for judicial review where a question of constitutional jurisdiction was presented. A noticeable decline has been remarked in the number of cases of this character which this Court has accepted for review since the October Term, 1931. See Frankfurter and Hart, *Supreme Court at October Term, 1932*, 47 Harv. L. Rev., 245, 270, n. 47.

In the past the courts have not been more successful in determining the scope of the provision excepting a "member of a crew." In this case, certainly, reasonable men may differ as to whether the deceased was a "member of a crew." In short, the order of the Deputy Commissioner is supported by substantial evidence and should, therefore, be affirmed.

It is important that the respondent's position should not be misunderstood. No claim is made that the deputy commissioners are necessarily better qualified than the courts to decide the question presented. There are no economic or social problems of great complexity in this case requiring special training and experience for sound solution. We do contend, however, that the question presented is one as to which reasonable men may well and even usually disagree. Nothing is to be gained therefore by substituting the judgment of the courts for that of the deputy commissioners, and the litigation which would be caused by denying finality to the administrative determination would tend to defeat the legitimate purpose of the Act.

CONCLUSION

It is respectfully submitted that the decision of the court below was correct and should be affirmed.

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JANUARY, 1940.

APPENDIX

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, C. 509, 44 STAT. 1424, 33 U. S. C. and U. S. C. SUPP. IV, SEC. 901 *ET SEQ.*

* * * * *

SEC. 2. When used in this chapter—

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

SEC. 3. *Coverage.*—(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

SEC. 5. *Exclusiveness of liability.*—The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative,

husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

SEC. 8. *Compensation for disability.*—Compensation for disability shall be paid to the employee as follows:

(c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability paid in accordance with subdivision (b) of this section, and shall be paid to the employee, as follows:

(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of

the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(i) In cases under subdivision (c) (21) and subdivision (e) of this section, whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may, with the approval of the Commission, approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 915 (b) and section 916 of this chapter: *Provided,* That the sum so agreed upon shall be payable in installments as provided in section 914 (b), which installments shall be subject to commutation under section 914 (j): *And provided further,* That if the employee should die from causes other than the injury after the Commission has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subdivision, to and for the benefit of the persons enumerated in subdivision (d) of this section. [As amended May 24, 1934, c. 354, §§ 2, 3, 48 Stat. 806; June 25, 1938, c. 685, §§ 4, 5, 52 Stat. 1165.]

SEC. 14. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter com-

pensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the commission, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 and an interlocutory injunction staying payments is allowed by the court as provided therein. [As amended June 25, 1938, c. 685, § 7, 52 Stat. 1167.]

(i) Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any award shall be made upon order of the deputy commissioner.

SEC. 15. (a) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $1,000.

(b) No agreement by an employee to waive his right to compensation under this chapter shall be valid.

SEC. 16. No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

SEC. 17. *Compensation a lien against assets.*—Any person entitled to compensation under the provisions of this chapter shall have a lien against the assets of the carrier or employer for such compensation without limit of amount, and shall, upon insolvency, bankruptcy, or reorganization in bankruptcy proceedings of the carrier or employer, or both, be entitled to preference and priority in the distribution of the assets of

such carrier or employer, or both. [As amended June 25, 1938, c. 685, sec. 8, 52 Stat. 1167.]

SEC. 18. *Collection of defaulted payments.*—In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this chapter, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office; or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the Supreme Court of the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings

to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

SEC. 19. (a) Subject to the provisions of section 913 of this chapter a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

SEC. 20. *Presumptions.*—In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

SEC. 21. *Review of compensation orders.*—(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for

the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District

of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter.

SEC. 23. (a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

SEC. 24. *Witnesses.*—No person shall be required to attend as a witness in any proceeding before a deputy commissioner at a place outside of the State of his residence and more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him; but the testimony of any witness may be taken by deposition or interrogatories according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the Supreme

Court of the District of Columbia if the case is pending in the District.

Act of May 4, 1928, c. 502, 45 Stat. 490 (33 U. S. C. Supp. IV, Sec. 921a):

That in any court proceedings under section 21 or other provisions of the Longshoremen's and Harbor Workers' Compensation Act, it shall be the duty of the district attorney of the United States in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the United States Employees' Compensation Commission or its deputy commissioner when either is a party to the case or interested, and to represent such commission or deputy in any court in which such case may be carried on appeal.

U. S. GOVERNMENT PRINTING OFFICE: 1948

UPREME COURT OF THE UNITED STATES.

No. 262.—October Term, 1939.

outh Chicago Coal & Dock Company and London Guarantee & Accident Company, Ltd., Petitioners, *vs.* arry W. Bassett, Deputy Commissioner, United States Employees' Compensation Commission, 10th Compensation District.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 26, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

John Schumann, an employee of petitioner, South Chicago Coal Dock Company, was drowned while serving his employer on a ssel in navigable waters of the United States. His widow was arded compensation by the deputy commissioner under the Long-oremen's and Harbor Workers' Compensation Act.[1] The deputy mmissioner found that decedent was performing services on the ssel as a laborer and fell from the vessel into the water. The ployer and its surety brought suit in the District Court to re-ain the enforcement of the award, contending that decedent was ployed as a member of the crew and hence that compensation s not payable. The District Court granted a trial *de novo* and ding that the decedent was a member of the crew vacated the ard.

The Court of Appeals found that the evidence before the Dis-ct Court was similar to that heard by the deputy commissioner; t the facts were not in dispute; that the District Court in re-wing the finding of the deputy commissioner was precluded from ighing the evidence, being required to examine the record and ertain whether there was any evidence to support the commis-ner's finding. Holding that there was such evidence, the Court

[1] 44 Stat. 1424; 33 U. S. C. and U. S. C. Supp. IV, secs. 901, *et seq.*

of Appeals reversed the decree of the District Court and directed the dismissal of the bill of complaint. 104 F. (2d) 522. Because of an alleged conflict with a decision of the Court of Appeals of the Fifth Circuit in the case of *Maryland Casualty Co.* v. *Lawson*, 94 F. (2d) 190, we granted certiorari. October 9, 1939.

The statute provides specifically in Section 3 as to "Coverage", that no compensation shall be payable in respect of the disability or death of a "master or member of a crew of any vessel".[2] And these persons were excluded from the definition of the term employee. Sec. 2(3).[3]

It appears that the vessel was a lighter of 312 net tons used for fueling steamboats and other marine equipment. It was licensed to operate in the Calumet River and Harbor and in the Indiana River and Harbor. The Court of Appeals thus summarized its operations: "It supplied coal to other vessels on their order, each operation consuming only a couple of hours. It had no sleeping or eating quarters. Its certificates of inspection required that 'Included in the entire crew hereinafter specified and designated must be 1 licensed master and pilot, 1 licensed chief engineer, three seamen, 1 fireman'; if deceased were counted as a member of the crew, the full complement of the ship was present, otherwise not". The captain testified before the deputy commissioner that he had five men on the boat with him, one engineer, fireman and three "deckhands", the decedent being one of the latter. The Court of Appeals described his chief task as "facilitating the flow of coal from his boat to the vessel being fueled—removing obstructions to the flow with a stick. He performed such additional tasks

[2] The entire text of Section 3 is as follows:

"Sec. 3. *Coverage.*—(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another". 33 U. S. C. 903.

[3] 33 U. S. C. 902(3).

as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties. He occasionally did some cleaning of the boat but he did not work while the boat was en route from dock to the vessel to be fueled." The Court of Appeals thought it significant that his only duty relating to navigation was the incidental task of throwing the ship's line; that his primary duty was to free the coal if it stuck in the hopper while being discharged into the fueled vessel while both boats were at rest; that he had no duties while the boat was in motion; that he was paid an hourly wage; that he had no 'articles'; that he slept at home and boarded off ship; that he was called very early in the morning each day as he was wanted; that while he had worked only three weeks, and it might have been possible that he would have been retained for years to come, his employment was somewhat akin to temporary employment.

In *Nogueira* v. *New York, New Haven & Hartford R. Co.*, 281 U. S. 128, we had occasion to consider the purpose and scope of the Longshoremen's and Harbor Workers' Compensation Act. Its general scheme was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occurring upon the navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law. We had held that one engaged as a stevedore in loading a ship lying in port in navigable waters was performing a maritime service and that the rights and liabilities of the parties were matters within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. But the Court had also held that in the case of a longshoreman who was injured on the land, although engaged in unloading a vessel, the local law governed and hence the workmen's compensation law of the State applied. *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263. The distinction had thus been maintained between injuries on land and those suffered by persons engaged in maritime employment on a vessel in navigable waters. As to the latter, no doubt was entertained of the power of Congress to modify the admiralty law and to provide for the payment by employers of compensation.[4] And in thus providing Congress had constitutional authority to define the classes of such

[4] See Waring v. Clarke, 5 How. 441, 457, 458; The Lottawanna, 21 Wall. 558, 577; Butler v. Boston Steamship Co., 130 U. S. 527, 556, 557; In re Garnett,

employees who should receive compensation and to exclude those described in Section 3. *Nogueira v. N. Y., N. H. & H. R. Co., supra.*

The legislative history of the exception now before us throws light upon the intention of Congress. For those employees who are entitled to compensation, the remedy under the Act is exclusive. Section 5.[5] This made inapplicable to such employees the provision of Section 33 of the Merchants Marine Act (called the Jones Act) which carried to "seamen" at their election the benefit of the provisions of the Federal Employers' Liability Act.[6] The bill, which became the Longshoremen's and Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a citizen of the United States.[7] They preferred however to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones Act, and the bill was changed accordingly so as to exempt "seamen". Then, on its final passage, the words "a master or member of a crew" were substituted for "seamen".[8] We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were "seamen". *International Stevedoring Company* v. *Haverty*, 272 U. S. 50; *Northern Coal Co.* v. *Strand*, 278 U. S. 142. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation act. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. We think it is clear that Congress in finally adopting the phrase "a master or member of a crew" in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel[9] and to whom state compensation statutes were inapplicable. The question is whether the decedent in this instance fell within that class.

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141 U. S. 1, 14; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 60, 62; Southern Pacific Co. v. Jensen, 244 U. S. 205, 215; Washington v. Dawson & Co., 264 U. S. 219, 227, 228; Panama R. R. Co. v. Johnson, 264 U. S. 375, 386, 388; Nogueira v. N. Y., N. H. & H. R. Co., 281 U. S. 128, 138.

[5] 33 U. S. C. 905.

[6] 41 Stat. 1007.

[7] House Rep. No. 1767, 69th Cong., 2d sess., pp. 1, 2, 20.

[8] Cong. Rec., 69th Cong., 2d sess., vol. 68, pt. 5, pp. 5402, 5403, 5908; Nogueira v. N. Y., N. H. & H. R. Co., 281 U. S. 128, 136.

[9] Except where they are engaged "to load or unload or repair any small vessel under eighteen tons net". Sec. 3(a)(1), 33 U. S. C. 903(a)(1).

So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not "a member of a crew" turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner.[10] Hence the Court of Appeals correctly ruled that his finding, if there was evidence to support it, was conclusive and that it was the duty of the District Court to ascertain whether it was so supported and, if so, to give it effect without attempting a retrial. We have so held with respect to the conclusiveness of the finding of the deputy commissioner that an injury to an employee arose "out of and in the course of employment", *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166; as to the finding of the dependency of a claimant for compensation, *L'Hote* v. *Crowell*, 286 U. S. 528, *The Admiral Peoples*, 295 U. S. 649, 653, 654; and as to the finding that the employee had committed suicide and hence that compensation was not payable, *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287. In the *Del Vecchio* case the question was with respect to the application of the exception made by paragraph (b) of Section 3 with respect to "Coverage", and we see no reason for a different view as to the application of paragraph (a) (1) of the same section.

Petitioners urge that the question whether the decedent was a member of a "crew" was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a "crew" as distinguished from a longshoreman or laborer at work upon the vessel. We are unable so to conclude.

The word "crew" does not have an absolutely unvarying legal significance. As Mr. Justice Story said in *United States* v. *Winn*, 3 Sumn. 209,[11] the general sense of the word crew is "equivalent to ship's company" which would embrace all the officers as well as the common seamen. But it was observed that the laws upon maritime subjects sometimes used the word crew in that general sense and "sometimes in other senses, more limited and restrained". "It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to

[10] 33 U. S. C. 919(a), 921.

[11] 28 Fed. Cas. 733, Case No. 16,740.

comprehend the common seamen only, excluding the master and officers". It was therefore deemed necessary to consider the context of the particular use of the term and the object to be accomplished by the enactment under consideration. In *The Bound Brook*, 146 Fed. 160, 164, it was said that "When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board". Judge Hough in *The Buena Ventura*, 243 Fed. 797, 799, thought that statement was a fair summary, and in his view one who served the ship "in her navigation" was a member of the "crew". *Id.*, p. 800. See, also, *Seneca Gravel Co.* v. *McManigal*, 65 F. (2d) 779. Recently, in considering the application of the Jones Act to "any seaman", we adverted to the "range of variation" in the use of the word "crew", and it was again emphasized that what concerned us in that case, which had relation to the status of a "master", was "not the scope of the class of seamen at other times and in other contexts". We said that our concern there was "to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained". *Warner* v. *Goltra*, 293 U. S. 155, 158.

That is our concern here in construing this particular statute—the Longshoremen's and Harbor Workers' Compensation Act—with appropriate regard to its distinctive aim. We find little aid in considering the use of the term "crew" in other statutes having other purposes. This Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Company* v. *Haverty, supra*), were still regarded as distinct from members of a "crew". They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See *De Wald* v. *Baltimore & Ohio R. Co.*, 71 F. (2d) 810; *Diomede* v. *Lowe*, 87 F. (2d) 296; *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. (2d) 245.

Regarding the word "crew" in this statute as referring to the latter class, we think there was evidence to support the finding of the deputy commissioner. The fact that the certificate of inspection called for three "deckhands" and that the captain included the

decedent to make up that complement is not controlling. The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as "in the position of longshoremen or other casual workers on the water". *Scheffler* v. *Moran Towing Co.*, 68 F. (2d) 11, 12. Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling.

The judgment of the Court of Appeals is affirmed.

Affirmed.

Mr. Justice MURPHY took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.